IN THE

MISSOURI SUPREME COURT

RANDALL KNESE,	)	
	)	
Appellant,	)	
	)	
vs.	)	**No. SC83822**
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. CHARLES COUNTY, MISSOURI
ELEVENTH JUDICIAL CIRCUIT
THE HONORABLE ELLSWORTH CUNDIFF, JR., JUDGE

APPELLANT'S REPLY BRIEF

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JURISDICTIONAL STATEMENT

Mr. Knese incorporates by reference the jurisdictional statement from his opening brief.

STATEMENT OF FACTS

Since the Respondent has not challenged Mr. Knese's rendition of the facts from this post-conviction case, (Resp.Br.13), Mr. Knese incorporates by reference the statement of facts from his opening brief.

POINTS RELIED ON

I. JURORS SHOULD HAVE BEEN STRUCK

The motion court clearly erred in overruling Randy's claim that counsel was ineffective for inadequately and incompletely voir diring venirepersons and not striking biased and unqualified jurors, like Dennis Gray and Richard Maloney, because this violated Randy's rights to due process, a fair trial before a fair and impartial jury, effective assistance of counsel and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution in that Wendt failed to review juror questionnaires or ask the court for sufficient time to review them before jury selection. Had he done so, he would have discovered that Gray and Maloney held views rendering them unqualified to serve—since they thought laws are "way too soft" on criminals; favored public executions; revered Oliver North; disfavored "endless appeals," last meals and "clergy to pamper a killer." If he had questioned them further, he would have moved to strike them for cause or peremptorily.

Morgan v. Illinois, 504 U.S. 719 (1992);

Wainwright v. Witt, 469 U.S. 412 (1985);

Witherspoon v. Illinois, 391 U.S. 510 (1968).

II. INADEQUATE VOIR DIRE

The motion court clearly erred in denying Randy's claim that counsel was ineffective for conducting an inadequate voir dire because counsel's actions violated Randy's rights to due process, effective assistance of counsel, a fair and impartial jury and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that counsel didn't ensure that veniremembers be asked whether they could consider the full range of punishment—including life without parole—and whether they were automatic death penalty jurors. Randy was prejudiced because his jury contained members who could not be fair and impartial.

Morgan v. Illinois, 529 U.S. 719 (1992);

State v. Nicklasson, 967 S.W.2d 596 (Mo.banc 1998);

Wainwright v. Witt, 469 U.S. 412 (1985);

Strickland v. Washington, 466 U.S. 668 (1984).

III. PENALTY PHASE WITNESSES NOT INVESTIGATED

The motion court clearly erred in denying Randy's claim that counsel was ineffective for not investigating or presenting mitigating evidence from family and friends: Charles Stock, Ralph Knese III, Stanley Miller, Janet Chalupny, Cindy Lane, Jane Knese, Robert Sutter, Scott Langelier, Shirley Harvey, because counsel's failure violated Randy's rights to due process, effective assistance of counsel and freedom from cruel and unusual punishment, under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, in that while Wendt called eight witnesses, he spent no time preparing them to testify and never investigated additional available witnesses. Had he done minimal investigation and preparation, he could have established that Randy's parents were distant, ignored him, gave him no supervision or guidance; Randy was an altar boy and involved in church, was an involved, successful sports team-player, received a college academic scholarship but not his dream of a sports scholarship, was shy of girls in high school, was devastated by his best friend's death in high school; was respectful, caring of others, a peacemaker. Randy was prejudiced because these witnesses would have given the jury a more accurate picture of who Randy was and would have given them reasons not to impose death, but to choose life.

Williams v. Taylor, 529 U.S. 362 (2000);

Jermyn v. Horn, 266 F.3d 257 (3rd Cir.2001);

Kenley v. Armontrout, 937 F.2d 1298 (8th Cir.1991);

Strickland v. Washington, 466 U.S. 668 (1984).

V. NO-ADVERSE-INFERENCE INSTRUCTION NOT GIVEN

The motion court clearly erred in denying Randy's claim that Wendt was ineffective for not voir diring on Randy's right not to testify and not requesting the "no-adverse-inference" instruction in guilt phase because this denied Randy's rights to remain silent, due process, a fair and impartial jury, effective assistance of counsel and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, in that Wendt's inaction allowed the jury's unfettered speculation about why Randy was not taking the stand in guilt phase—including that he was confessing to first degree murder.

Carter v. Kentucky, 450 U.S. 288 (1981);

Lakeside v. Oregon, 435 U.S. 333 (1978);

Bruno v. United States, 308 U.S. 287 (1939).

ARGUMENT

I. JURORS SHOULD HAVE BEEN STRUCK

The motion court clearly erred in overruling Randy's claim that counsel was ineffective for inadequately and incompletely voir diring vernirepersons and not striking biased and unqualified jurors, like Dennis Gray and Richard Maloney, because this violated Randy's rights to due process, a fair trial before a fair and impartial jury, effective assistance of counsel and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that Wendt failed to review juror questionnaires or ask the court for sufficient time to review them before jury selection. Had he done so, he would have discovered that Gray and Maloney held views rendering them unqualified to serve—since they thought laws are "way too soft" on criminals; favored public executions; revered Oliver North; disfavored "endless appeals," last meals and "clergy to pamper a killer." If he had questioned them further, he would have moved to strike them for cause or peremptorily. (Responds to Respondent's Point I).

Respondent does not dispute that Messrs. Gray and Maloney served on Randy's jury, Gray as the foreperson (Resp.Br.18); that Wendt asked no questions about the death penalty in general and asked no questions of Gray or Maloney (Resp.Br.18); that Wendt never reviewed their questionnaires before jury selection (Resp.Br.19) or that Wendt would have questioned or moved to strike them based on their questionnaire answers.

(Resp.Br.19). Respondent also does not dispute that Maloney's questionnaire demonstrated his belief that, as to the death penalty, "If he is found guilty, do it." (Resp.Br.16;M.Exh.42). Respondent wisely does not attempt to assert that Wendt's performance was adequate, since Wendt himself acknowledged that his failure to investigate—to read the jurors' questionnaires—or to request adequate time to do so—and then question them about their views on the death penalty was "the most egregious mistake I've ever made in the trial of a case…there's no excuse for it." (Wendt depo146).

Instead, Respondent asserts that Randy has failed to show prejudice from Wendt's failures to act. (Resp.Br.21). Respondent seems to suggest that Gray and Maloney's views on the death penalty, for example, that "if he is found guilty, do it," are merely "collateral consequences" of Randy's conviction and sentence. (Resp.Br.21). Apparently, under Respondent's views, executing Randy upon a finding of guilt would be a mere collateral consequence of his conviction. Were this case not so serious, Respondent's position would be laughable.

Gray and Maloney's questionnaire answers demonstrate their inability fairly to sit on a death penalty case. At the very least, as Wendt testified, based on their questionnaire answers, he would have wanted to voir dire them to establish the depth of their unfairness. (PCRTr32,86). Respondent seems to suggest that, unless a juror has a demonstrable inability to be fair in **guilt** phase, that juror is qualified to sit in a capital case. (Resp.Br.21-23). Were Respondent correct, *Morgan v. Illinois*, 504 U.S. 719 (1992); *Wainwright v. Witt*, 469 U.S. 412 (1985); *Witherspoon v. Illinois*, 391 U.S. 510 (1968) and related cases would be meaningless since those cases address the mechanisms

used to identify jurors who, because of their views on punishment, are unqualified to sit in capital cases. Respondent's suggestion that the "can you be fair and impartial" question ended the inquiry is likewise ludicrous. Preliminarily, neither Gray nor Maloney responded to the question. In *Morgan*, when all empaneled jurors were asked if they could be fair and impartial, all agreed they could. The Court, however, stated that the question was insufficient to detect automatic death penalty jurors. It noted that *Witherspoon* and its progeny "would be in large measure superfluous were this Court convinced that such general inquiries could detect those jurors with views preventing or substantially impairing their duties in accordance with their instructions and oath." *Morgan*, 504 U.S. at 734-35.

This Court must reverse and remand for a new trial or a new penalty phase or, in the alternative, must reverse and impose a sentence of life without probation or parole.

II. INADEQUATE VOIR DIRE

The motion court clearly erred in denying Randy's claim that counsel was ineffective for conducting an inadequate voir dire because counsel's actions violated Randy's rights to due process, effective assistance of counsel, a fair and impartial jury and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that counsel didn't ensure that veniremembers be asked whether they could consider the full range of punishment—including life without parole—and whether they were automatic death penalty jurors. Randy was prejudiced because his jury contained members who could not be fair and impartial. (Responds to Respondent's Point I)

As Respondent admits, (Resp.Br.16-18), the sole question the court asked the entire venire about punishment was:

> It is my understanding that the State will be asking for the death penalty in this case. That is range of punishment. I will instruct you on the range of punishment. Is there anybody that could not follow the Court's instructions with respect to the range of punishment? Basically folks, that is what I'm asking you is the death penalty question. Is there anybody here that feels that they could not follow the Court's instructions?

(Tr42-43). The court followed-up individually with each juror who expressed problems about the death penalty (Tr60-61,67-97,99-101). He only asked if they could consider death, never whether they could consider life *Id.* He never asked about mitigation or if they would automatically impose death. *Id.* When the prosecutor tried to expand the

questioning, the court refused (Tr118-19,166-67), stating, "We have already asked these people their opinion on the death penalty everybody sitting out there right now told you, told me that they can do the death penalty. I don't want you going into this area." (Tr119).

As in Point I, supra, Respondent wisely does not assert that this voir dire examination was sufficient. Indeed, since neither the *Witherspoon* question (determining if a juror will automatically vote for death, regardless of evidence and instructions, *Witherspoon v. Illinois*, 391 U.S. 510, 522 n.21 (1968)) nor the *Witt* question (determining if a juror will automatically vote for life, *Wainwright v. Witt*, 469 U.S. 412, 424 (1985)) were asked, a constitutionally-adequate voir dire did not occur. *Morgan v. Illinois*, 529 U.S. 719 (1992); *Lockhart v. McCree*, 476 U.S. 162, 180 (1986); *State v. Nicklasson*, 967 S.W.2d 596, 611 (Mo.banc 1998). Rather, Respondent appears to assert that no prejudice resulted from the inadequate voir dire. (Resp.Br.21-23). Respondent also appears to assert that Randy has not met his burden of proof on this issue since he did not elicit answers from Wendt about his failure to ensure the voir dire included questions to identify unqualified jurors. (Resp.Br.19).

As to the latter question, Respondent's own brief contains the answer. (Resp.Br.19). At the evidentiary hearing, counsel attempted to ask Wendt about his failure to conduct an adequate voir dire. The court sustained the state's objection to those questions, stating that this Court had decided the area of inquiry on direct appeal. (PCRTr45-46). Since Randy was precluded from eliciting the information, he cannot now be condemned for failing to adduce that evidence. *Taylor v. State*, 728 S.W.2d 305,

307 (Mo.App.,W.D.1987). Respondent's argument nonetheless misses the point. Wendt asked no questions and attempted to ask no questions and thus participated in a constitutionally inadequate voir dire. Despite the motion court's repeated assertions, (PCRLF840), voir dire was woefully inadequate.

As to the former question, under *Strickland v. Washington*, 466 U.S. 668 (1984), to prove prejudice, Randy must show a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Id; State v. Butler*, 951 S.W.2d 600, 608 (Mo.banc 1997). Jurors Gray and Maloney, whose questionnaire answers reveal their predisposition to impose death, even just upon conviction—"do it"—demonstrate that reasonable probability. Had Wendt engaged in the most bare bones of questioning, it is reasonably probable that he would have discovered their views and would have struck them from Randy's jury. Absent those questions, "fundamental fairness in a capital trial" has been denied. *Nicklasson*, 967 S.W.2d at 611.

This Court must reverse and remand for a new trial or, at the very least, a new penalty phase.

III. PENALTY PHASE WITNESSES NOT INVESTIGATED

The motion court clearly erred in denying Randy's claim that counsel was ineffective for not investigating or presenting mitigating evidence from family and friends: Charles Stock, Ralph Knese III, Stanley Miller, Janet Chalupny, Cindy Lane, Jane Knese, Robert Sutter, Scott Langelier, Shirley Harvey, because counsel's failure violated Randy's rights to due process, effective assistance of counsel and freedom from cruel and unusual punishment, under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, in that while Wendt called eight witnesses, he spent no time preparing them to testify and never investigated additional available witnesses. Had he done minimal investigation and preparation, he could have established that Randy's parents were distant, ignored him, gave him no supervision or guidance; Randy was an altar boy and involved in church, was an involved, successful sports team-player, received a college academic scholarship but not his dream of a sports scholarship, was shy of girls in high school, was devastated by his best friend's death in high school; was respectful, caring of others, a peacemaker. Randy was prejudiced because these witnesses would have given the jury a more accurate picture of who Randy was and would have given them reasons not to impose death, but to choose life.

Respondent acknowledges that Wendt "likely spent only a maximum of ten hours preparing the penalty phase" (Resp.Br.31;PCRTr72). Wendt further acknowledged that he obtained no records of Randy's life because, "I told you I only spent maybe a

maximum of a few hours preparing the penalty phase. Where are you going to gather those kinds of records in two hours?" (Wendt depo 123).

Wendt's "investigation," if that term can even be used to describe his actions, consisted of asking Randy's parents, in the April preceding the June trial, to get "some people lined up" who might know Randy's character traits. (KneseJ depo661; Wendt depo104,116;PCRTr54). The Kneses talked to family and friends and gave Wendt a select group of names and their phone numbers. (KneseJ depo662; Knese RIII depo425). In late May to early June, Wendt told the Kneses to tell those people to hold the trial dates open in case he needed them. (KneseJ depo662). Even so close to trial, Wendt had only talked to Randy and his parents. (KneseJ depo662). Wendt told the witnesses to come to court at 8 a.m. the morning penalty phase would begin. (KneseJ depo664). Wendt finally talked to the witnesses, for 5-10 minutes. (KneseJ depo665-66; Knese RIII depo424). He merely told them to talk about Randy's good traits and characteristics. (KneseJ depo666). He told Ralph III to "be positive, talk highly of your brother." (Knese RIII depo423). Although Wendt acknowledged Mrs. Harvey, he told her nothing so she didn't know what to expect. (Harvey depo53-54). The witnesses who testified did so extemporaneously, with no further preparation. (KneseJ depo666). Because Wendt had never talked to them, he had not a clue what they **could** say. And, because his investigation comprised of just telling Randy's family to pick out witnesses, he had not a clue what additional compelling information in mitigation of punishment might exist.

Respondent seems to suggest first that Randy has not shown Wendt was ineffective for failing to call witnesses because he has not shown that Wendt knew or

should have known of their existence. (Resp.Br.33). Respondent asserts that "[b]ecause he did not prove that counsel knew or should have known of the six witnesses who did not testify at trial, appellant's claim regarding those six witnesses must fail." (Resp.Br.34). The underlying premise of Respondent's assertion must be that it is sufficient "investigation" to discover what witnesses are available to ask the defendant or his parents to get "some people lined up" who might know the defendant's character traits. (KneseJ depo661). To establish ineffective assistance of counsel, one must show that counsel's performance was deficient and that prejudice resulted. *Strickland v. Washington*, 466 U.S. 668 (1984). Under the first prong of the test, **counsel** has a duty to "make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id*., at 691; *Kenley v. Armontrout*, 937 F.2d 1298, 1304-09 (8th Cir.1991). Respondent's position seems to attempt to shift the burden of investigation to the movant and his family in a situation such as this. Yet, the test is not one of ineffective assistance of family. Had Wendt done the bare bones of an investigation, he could easily have discovered people like Charles Stock, who lives down the street from the Kneses; the Chalupnys, parents of Randy's best friend as a child; and Larry Scott Langelier, with whom Randy played sports and attended religion classes. Instead, he merely relied on Randy's parents to give him a list of names, without further guidance. Randy's parents had no obligation under the Sixth Amendment to provide effective assistance of counsel. But Wendt did. And in that obligation, he failed entirely. Wendt had a duty to investigate, independent of his client, *Carter v. Bell*, 218 F.3d 581, 589 (6th Cir. 2000).

Respondent also seems to assert that Wendt's actions were based on strategic decisions to avoid evidence of Randy's drug use. (Resp.Br.34-36). While strategic decisions are virtually unassailable, strategy can only be considered **after** reasonable investigation occurs. *Strickland*, 466 U.S. at 691. And in this case, Wendt's investigation was not reasonable, nor did he have any reasonable basis for limiting the amount of investigation he did. Indeed, his excuse for not obtaining any records about Randy—including school, church, sports—was that, since he only spent a total of ten hours on penalty phase preparation, he obviously couldn't get those records in that limited amount of time.

Respondent finally asserts that *Williams v. Taylor*, 529 U.S. 362 (2000) is inapplicable because the evidence presented through depositions at the post-conviction hearing and readily available to trial counsel "simply was not of the quality or magnitude of that in *Williams*, but was simply additional evidence of appellant's background, which, as previously stated, counsel had no duty to present." (Resp.Br.37). Presenting **some** mitigating evidence "does not excuse the failure to provide evidence of different mitigating circumstances." *Jermyn v. Horn*, 266 F.3d 257, 305 (3rd Cir. 2001). The jury never heard about most of the facts to which the additional witnesses could have testified. Their testimony was not cumulative but could have added further dimensions to how the jury perceived Randy and thus contributed to their decision in penalty phase. Further, *Williams* does not set a standard under which the "quality" of evidence is to be judged. Rather, it set a standard under which counsel's investigation will be judged. And here, Wendt's failure to do practically any investigation fell woefully short of that standard.

As Wendt himself acknowledged, "the real question I have in my mind is whether I had spent the time perhaps that I should have spent to develop both more information from specific individuals and additional individuals—if I had it to do over again, I may have called some additional witnesses." (Wendt depo118).

Wendt rendered constitutionally ineffective assistance of counsel. This Court must reverse for a new penalty phase, or impose a life without probation or parole sentence.

V. NO-ADVERSE-INFERENCE INSTRUCTION NOT GIVEN

The motion court clearly erred in denying Randy's claim that Wendt was ineffective for not voir diring on Randy's right not to testify and not requesting the "no-adverse-inference" instruction in guilt phase because this denied Randy's rights to remain silent, due process, a fair and impartial jury, effective assistance of counsel and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, in that Wendt's inaction allowed the jury's unfettered speculation about why Randy was not taking the stand in guilt phase—including that he was confessing to first degree murder.

Respondent asserts that Wendt's failure to voir dire on Randy's right not to testify and failure to request the "no adverse inference" instruction in guilt phase was a reasonable strategic decision. (Resp.Br.52). Wendt stated he did neither because he did not want to highlight that Randy did not testify. (Wendt depo138; PCRTr48). The United States Supreme Court, in *Carter v. Kentucky*, 450 U.S. 288 (1981), rejected this reasoning as specious. There, it noted that Kentucky had asserted the instruction would have emphasized the defendant's failure to testify. It stated, "This purported justification was specifically rejected in the *Lakeside* (*Lakeside v. Oregon*, 435 U.S. 333,339(1978)) case, where the Court noted that '[i]t would be strange indeed to conclude that this cautionary instruction violates the very constitutional provision it is intended to protect.'"

Carter, 450 U.S. at 303. Clearly, Wendt's decision was not reasonable. The only question, therefore, is whether his inaction prejudiced Randy. It did.

Had Wendt requested the instruction, the jury would have understood that they could not consider Randy's failure to testify as evidence of guilt. An instruction to that effect is "perhaps nowhere more important than in the context of the Fifth Amendment privilege against compulsory self-incrimination." *Carter*, 450 U.S. at 302. To suggest that the instruction would have had no effect is tantamount to saying that jurors will disregard the court's instructions. *Id.*; *Bruno v. United States*, 308 U.S. 287,294(1939).

This Court must reverse and remand for a new trial.

CONCLUSION

Based on the foregoing arguments and those contained in his opening brief, Randy requests that this Court reverse and remand for a new trial, for a new penalty phase, vacate his death sentence and re-sentence him to life without parole, and for an evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this ___ day of May, 2002, one true and correct copy of the foregoing brief and floppy disk(s) containing a copy of this brief was mailed, postage pre-paid to the Office of the Attorney General, Missouri Supreme Court Building, Jefferson City, MO 65102.

Janet M. Thompson

CERTIFICATE OF COMPLIANCE

I, Janet M. Thompson, hereby certify as follows:

The attached brief complies with the limitations contained in this Court's Rule 84.06. The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. This brief contains 4131 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

The floppy disk(s) filed with this brief contain(s) a copy of this brief. The disk(s) has/have been scanned for viruses using a McAfee VirusScan program. According to that program, the disk(s) is/are virus-free.

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Janet M. Thompson